TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~285~~ 73.

THE YOUNG WOMEN'S CHRISTIAN HOME, APPELLANT,

vs.

JOHN L. FRENCH, ADMINISTRATOR OF EUGENE RHODES, DECEASED.

No. ~~286~~ 74.

BARBARA FAUL AND ANDREW WASNER, APPELLANTS,

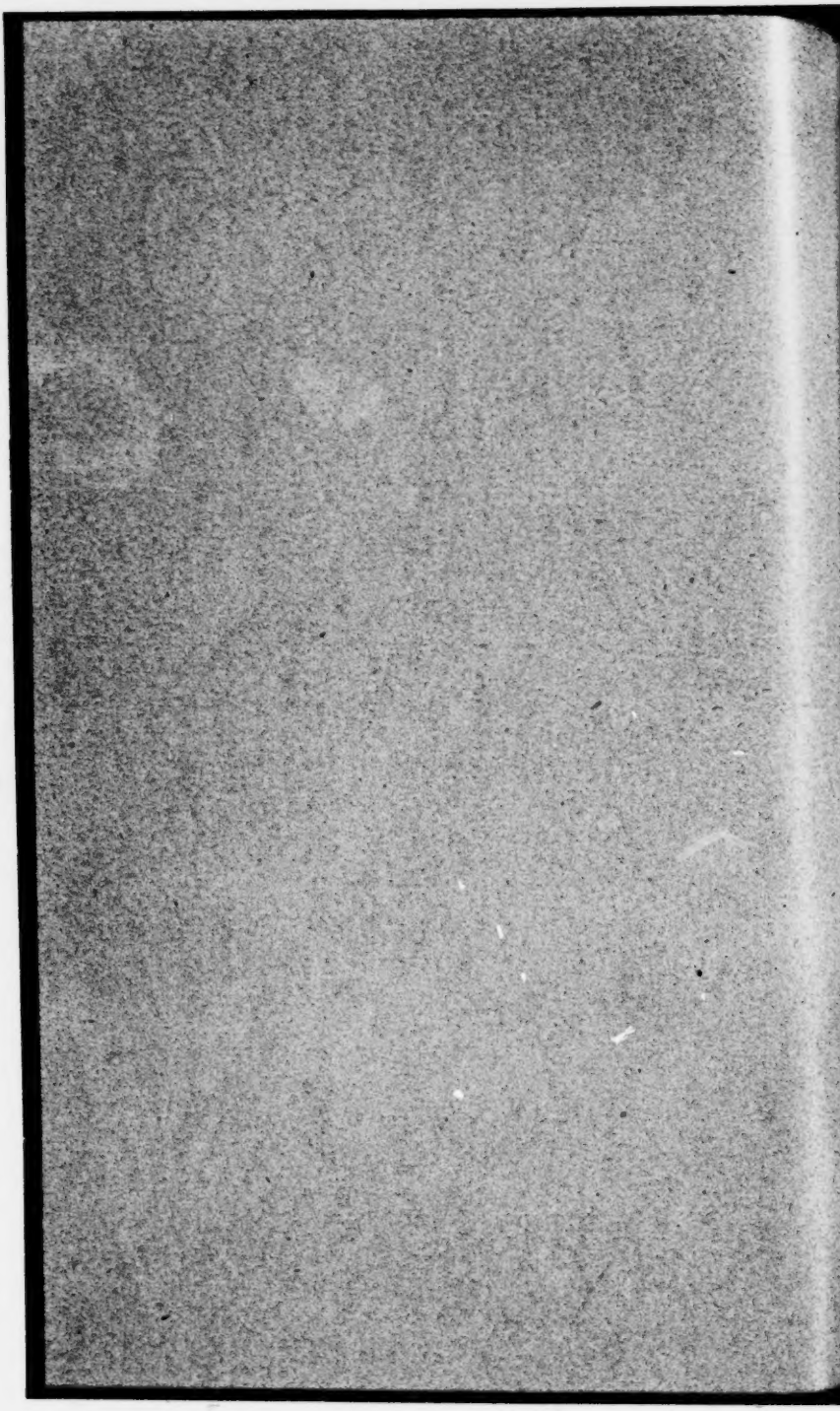
vs.

JOHN L. FRENCH, ADMINISTRATOR OF EUGENE RHODES, DECEASED.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 8, 1901.

(18,098 & 18,099.)



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No. 285.

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JOHN L. FRENCH, ADMINISTRATOR OF EUGENE RHODES, DECEASED.

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In the Court of Appeals of the District of Columbia

BARBARA FAUL ET AL., Appellants,
vs.
GEORGE W. HULICK ET AL. } No. 1010.

a Supreme Court of the District of Columbia.

GEORGE W. HULICK ET AL.
vs.
THE YOUNG WOMEN'S CHRISTIAN HOME ET AL. } No. 18968. Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill of Interpleader.*

Filed Jan. 19, 1898.

In the Supreme Court of the District of Columbia, Holding a Special Term for Equity Business.

GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased, Complainants,
vs.
THE YOUNG WOMEN'S CHRISTIAN HOME, Barbara Faul, Andrew Wasner, and John L. French, Administrator of Eugene Rhodes, Deceased. } Equity. No. 18968.

To the honorable justice of the supreme court of the District of Columbia, sitting in equity:

Your complainants respectfully represent to the court:

First. That on the 7th day of March, A. D. 1895, the complainants, George W. Hulick, a resident of Batavia, Ohio, and John B. Larner, a resident of the District of Columbia, were duly appointed and qualified as administrators, with the will annexed, of Sophia Rhodes, deceased; that said last will and testament, after having been duly proven by the witnesses thereto, was, on the 23rd day of February, 1895, duly admitted to probate and record, and letters of administration, with the will annexed, issued to your complainants,

a copy of which said last will and testament is hereto attached, being marked Complainants' Exhibit No. 1.

2 Complainants bring this suit as administrators for the purpose of determining the respective rights of the defendants herein to share as distributees in the personal estate of Sophia Rhodes, deceased.

Second. The defendant The Young Women's Christian Home is a corporation under and by virtue of an act of Congress of the United States approved February 23rd, 1886, which corporation exercises its franchises conferred by said act of Congress in the District of Columbia. The defendants The Young Women's Christian Home, Barbara Faul, and Andrew Wasner are all sued in their own right, and the said John L. French is sued as administrator of the estate of Eugene Rhodes, deceased, for the purpose of determining what share they are respectively entitled to, if any, in the assets of the estate of Sophia Rhodes, deceased.

Third. Your complainants further represent that on the 27th day of January, 1895, one Oliver Wheeler Rhodes, a resident of the District of Columbia, the husband of said Sophia Rhodes, now deceased, departed this life in the city of Washington, D. C., leaving Sophia Rhodes, his widow, and Eugene Rhodes, his son and only heir-at-law, surviving, and your complainants are advised and believe that at the time of the death of said Oliver W. Rhodes at Washington, D. C., his wife, the said Sophia Rhodes, and their only child, Eugene Rhodes, were temporarily sojourning at Heidelberg, Germany. In response to a telegraphic communication advising them of the decease of said Oliver W. Rhodes, they embarked at Brehmerhaven, Germany, on the steamer Elbe, on or about the 29th day of January, 1895, intending thereby to return to America, in answer to said telegraphic communication.

3 Your complainants are advised, and being so advised aver, that during the progress of said steamer, to wit, in the North sea on or about the 30th day of the said month of January, 1895 (about five o'clock in the morning of said day), it, the said steamer, was run into by another vessel called the Craithie, which struck the Elbe amidship, and was so injured that within a short space of about twenty minutes the said steamer Elbe foundered and sank out of sight. Your complainants are advised and on information believe that said Sophia Rhodes and Eugene Rhodes, her son, being passengers on said vessel, with many other passengers on said vessel lost their lives as the result of said collision and the foundering of said steamer Elbe; that on or about the 8th day of March, 1895, your complainants were advised by telegraphic communication received from the American minister at The Hague that a body had been recovered from the North sea by some fishermen, and that certain papers and a ring found upon said body indicated it to be the body of Eugene Rhodes; that thereafter, to wit, on the 7th day of March, 1895, an inquest was held at Gravesande, Holland, upon said body, and the same was identified as being that of Eugene Rhodes, the son of said Sophia Rhodes and said Oliver W. Rhodes, a certi-

fied copy of which said inquest was transmitted to these complainants by the United States consul at Rotterdam, together with the papers and ring hereinbefore referred to, which said ring has engraved thereon the name of Sophia Rhodes, and your complainants have every reason to believe, and so believing aver, that said body was that of Eugene Rhodes. Your complainants further state that the body of Sophia Rhodes has never been recovered, nor have they received any information or knowledge whatever as to its
4 whereabouts. Your complainants have filed herewith, marked Complainants' Exhibit No. 2, a certified copy of said inquest held upon the body of said Eugene Rhodes at Gravesande, together with a translation thereof made by the United States consul at Rotterdam.

Fourth. Your complainants further represent to the court that as administrators of the estate of Sophia Rhodes, deceased, they duly qualified and took possession of all the assets belonging to the said Sophia Rhodes, deceased, of which they could obtain any knowledge or information, which said assets are fully set forth in inventories filed by your complainants in the orphans' court of the District of Columbia; that thereafter your complainants, in accordance with the authority conferred upon them as such administrators, proceeded to administer the estate of said Sophia Rhodes, deceased, and on the — day of ——, 1896, after having paid and satisfied all legal debts of said Sophia Rhodes, they filed in said court their first and final account, which said account, after having been duly considered by the court, was passed and recorded, a certified copy of which said account, showing the entire receipts and disbursements made by said administrators, is filed herewith and prayed to be taken as a part of their bill of complaint, being marked Complainants' Exhibit No. 3.

Fifth. Your complainants further represent that the said Sophia Rhodes, if her said son, Eugene Rhodes, did not survive her, left as her next of kin and only heirs and representatives, as your complainants are informed and believe, the following-named persons: Andrew Wasner, an only brother, who resides at Batavia, Ohio, and Barbara Faul, an only sister, who resides at Batavia, Ohio; that said Eugene Rhodes died intestate, and if he survived his mother, the said Sophia Rhodes, left as his only heirs-at-law and next
5 of kin the said Andrew Wasner and Barbara Faul, brother and sister of his said mother, Sophia Rhodes, deceased; John G. Rhodes, a brother of said Oliver W. Rhodes, deceased (then residing in Georgetown, Ohio). The said John G. Rhodes, afterwards, on the — day of ——, 1897, departed this life intestate, leaving Kate Rhodes, his widow, residing at Georgetown, Ohio, and the following-named children: Dwight Rhodes, of Georgetown, Ohio; John Rhodes, of Nashville, Tenn.; Belle Rhodes Latham, wife of J. C. Latham, of Burlington, Iowa; Genevieve Rhodes, of Cincinnati, Ohio, and Mary Rhodes Story, wife of John Story, of Cincinnati, Ohio; Alice M. Fitch, wife of Michael H. Fitch and sister of Oliver W. Rhodes, deceased, residing at Pueblo, Colorado, and Melville

Rhodes, a brother of said Oliver W. Rhodes, deceased, residing at Denver, Colorado.

Sixth. On the 5th day of March, A. D. 1896, the defendant John L. French was duly appointed and qualified as administrator of the estate of Eugene Rhodes, deceased, by the supreme court of the District of Columbia, holding a special term for orphans' court business.

Seventh. Your complainants further represent that the defendant The Young Women's Christian Home, by virtue of the last will and testament of said Sophia Rhodes, deceased, claims an interest in said estate; the said Andrew Wasner and Barbara Faul, as heirs-at-law and next of kin of said Sophia Rhodes at the time of her death, claim an interest in said estate, and the said John L. French, as administrator of the said Eugene Rhodes, deceased, claims an interest in said estate. By reason of said conflicting claims your com-
6 plainants, as administrators of the estate of Sophia Rhodes, deceased, are unable to make distribution of the assets in their hands, and for this reason are compelled to file this their bill of complaint for the purpose of requiring the parties who claim the several interests, as aforesaid, to interplead for the purpose of determining which of said conflicting interests are entitled to receive said estate or any part thereof.

Wherefore your complainants pray:

First. That subpœnas may issue directed to the defendants, requiring them to appear and answer the exigencies of this bill of complaint.

Second. That the defendants be required to interplead among themselves for the purpose of establishing whatever claim or right they may each have to the funds or any part thereof in the hands of your complainants.

Third. And for such other and further relief as the nature of the case may require and to the court may seem fit and proper.

GEORGE W. HULICK,
JOHN B. LARNER,
Adm'rs Estate Sophia Rhodes, Dec'd.

THE STATE OF OHIO, }
Clermont County, } *ss:*

We do solemnly swear that we have read the foregoing bill of complaint by us subscribed and know the contents thereof; that the matters and things therein stated of our own personal knowl-
7 edge are true, and those stated upon information and belief we believe to be true.

GEORGE W. HULICK.

Subscribed and sworn to before me this 28th day of December, A. D. 1897.

STANLEY S. HULICK,
[SEAL.] *Notary Public in and for Clermont County, Ohio.*

Notary fee, 40c.

Joint and Several Answer of Barbara Faul and Andrew Waesner to Bill of Interpleader.

Filed May 20, 1898.

In the Supreme Court of the District of Columbia.

GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased, Complainants, *vs.* THE YOUNG WOMEN'S CHRISTIAN HOME, Barbara Faul, Andrew Waesner, and John L. French, Administrator of Eugene Rhodes, Deceased, Defendants.	Equity. No. 18968.

Joint and several answer of Barbara Faul and Andrew Waesner, parties defendant.

8 Comes now the above-named Barbara Faul and Andrew Waesner, parties defendant herein, and, waiving the issuance and service of process, hereby respectively enter appearance herein, — for joint and several answer to the bill of interpleader herein filed say:

1. They admit the allegations contained in paragraph one of said bill.

2. They admit the averments contained in paragraph two of said bill.

3. They admit the averments contained in paragraph three of said bill to be substantially correct as therein set forth so far as they have been advised or have any knowledge in respect of the matters therein stated.

4. They admit the averments contained in paragraph four of said bill, and they further say that, as will appear from the first and final account of the complainants herein, as administrators *c. t. a.* of the estate of Sophia Rhodes, deceased, in said paragraph referred to, said complainants now have in their hands, as such administrators aforesaid, after the satisfaction, payment, and discharge of all lawful claims, debts, and charges against the said estate, including the administraton thereof, for distribution to and among those entitled thereto, the sum of $14,891.89.

5. They admit the averments contained in the fifth paragraph of said bill, and aver that the defendant Barbara Faul is the only sister and the defendant Andrew Waesner is the only brother of said Sophia Rhodes, deceased, and that they are the only heirs-at-law and next of kin of said decedent, and as such, upon the death intestate of the said Sophia Rhodes, are entitled to her entire estate, both real and personal, as hereinafter set forth.

9 6. They admit the averments contained in the sixth paragraph of said bill.

7. They admit the averments contained in the seventh paragraph of said bill.

(*a.*) Further answering, these defendants say that by the terms and provisions of the last will and testament of Sophia Rhodes, deceased (Exhibit No. 1 to said bill herein), as set forth in item 2 thereof, the said testatrix gave, devised, and bequeathed to her said son and only child, Eugene, all her property, real, personal, and mixed, of whatsoever nature, kind, or description, including moneys, credits, and evidences of indebtedness of which she might be possessed at the time of her death, to be his absolutely, to hold and dispose of as unto him might seem good and proper, subject only to the provisions of item 1 of said will, which said item 1 provided that during the lifetime of the husband of said testatrix, Oliver Wheeler Rhodes, he should receive the one-half of the net income from all the properties and estate of testatrix. The said husband, Oliver Wheeler Rhodes, predeceased both his said wife, the testatrix aforesaid, and the said son, Eugene Rhodes. These defendants further say and aver that the said Eugene Rhodes, son of said testatrix, died intestate, and in the same disaster at sea, set forth in the bill herein, with his mother, the said testatrix; and they aver that the fact is unknown and unascertainable whether the son survived the mother (testatrix) or whether the mother survived the son; and that her said estate therefore did not vest in the said son, Eugene Rhodes, and hence did not descend to the heirs-at-law and next of kin of the said Eugene Rhodes, and they as such heirs-at-law and next of kin are not entitled to a distributive share in said estate.

(*b.*) Defendants further say that by the terms and provisions of said will, as contained in item 3 thereof, said testatrix directed that in the event of the death of her said son, Eugene Rhodes, before the decease either of said testatrix or of her husband, the said Oliver Wheeler Rhodes, she then gave, devised, and bequeathed all of her said property and estate, subject only to a life estate in the rents and profits arising therefrom to her said husband, unto the Young Women's Christian Home, in the city of Washington, District of Columbia, party defendant herein. The husband of said testatrix predeceased both wife and son, as hereinabove averred, and the said son, Eugene Rhodes, and the said testatrix having perished in the same disaster at sea, in the steamer Elbe, as above averred, and the fact is unknown and cannot be ascertained whether the said son survived his mother, said testatrix, or not, therefore the said Young Women's Christian Home, party defendant herein, is not, by reason of said clause of said will, entitled to the said estate.

(*c.*) And these defendants further say that by the terms and provisions of said will, as contained in item 4 thereof, said testatrix directed that in the event of said testatrix becoming the survivor of both her husband, the said Oliver Wheeler Rhodes, and of her son, the said Eugene Rhodes, she then gave, devised, and bequeathed all her property, real, personal, and mixed, of whatsoever nature, kind, or description, to the Young Women's Christian Home, of the city

of Washington, in the District of Columbia (party defendant herein and above referred to); to have and to hold the same absolutely and forever for the good of that institution; and de-
11 fendants say that the said testatrix and her said son, the said Eugene Rhodes, having lost their lives in the same disaster at sea, on the steamer Elbe, as above, it has never been ascertained and cannot be determined whether the said testatrix survived both her said husband and son, and that the said Young Women's Christian Home, named in said will and party defendant herein, is therefore not entitled to the whole or any part of said estate by virtue of said will.

(*d.*) And these defendants further say and aver that the said Sophia Rhodes, testatrix aforesaid, and her said son, Eugene Rhodes, both perished by a common disaster at sea on the steamer Elbe, as hereinabove and in the bill herein averred, and that their death was occasioned by one and the same cause; that the fact is not known and cannot be ascertained whether the said Sophia Rhodes survived her said son, Eugene, or whether he survived his said mother, and, further, that there is no evidence to the contrary that both mother and son died at the same time; wherefore these defendants are advised by counsel, and therefore aver, that they, as such heirs-at-law and next of kin of said decedent, Sophia Rhodes, are entitled to receive the entire estate and fund here in controversy and now in the hands of the complainants herein, as such administrators aforesaid, as in case of the death intestate of the said Sophia Rhodes.

Wherefore these defendants aver:

1. That the said John L. French, administrator of the said Eugene Rhodes, deceased, party defendant herein, is not entitled to the said property and estate or any part thereof in the hands of said
12 complainants, as aforesaid, for the reason that in contemplation of law the estate of the said Sophia Rhodes never vested, either by devise or descent, in the said Eugene Rhodes, deceased, and therefore did not descend to his heirs-at-law or next of kin.

2. That in contemplation of law the death of the said Eugene Rhodes did not occur before the death of the said testatrix, as provided in item No. 4 of said will, and therefore the said Young Women's Christian Home, of the city of Washington, in the District of Columbia, and party defendant herein, is not entitled to said estate or any part thereof under said clause of said will.

3. That in contemplation of law the said testatrix did not become the survivor of her son, the said Eugene Rhodes, as provided in item 4 of said will, and therefore the said Young Women's Christian Home is not entitled to said estate or any part thereof under said clause of said will.

4. That in contemplation of law the death of the said Sophia Rhodes and of the said Eugene Rhodes occurred at the same time, and therefore said estate descended to these defendants as the only heirs-at-law and next of kin of the said decedent, Sophia Rhodes, as in case of intestacy.

Wherefore, the premises considered, these defendants pray:

1. That they be decreed to be the only heirs-at-law and next of kin of the said Sophia Rhodes, deceased, and as such entitled to the whole estate of the said Sophia Rhodes, deceased, and entire fund here in controversy, as in the case of the death intestate of said Sophia Rhodes.

2. That the complainants herein, as such administrators
13 aforesaid, be decreed to pay over to these defendants all moneys and assets now in their hands belonging to said estate, and here in interpleader, and to indorse and deliver to them all notes, mortgages, and other evidences of indebtedness or securities, if any there be, as well all papers of every description now in their possession belonging to said estate.

3. And for all such other and further relief as may be proper in equity and as the nature of the case may require.

BARBARA FAUL,
ANDREW WASNER,
Parties Defendant.

J. M. WILSON,
A. A. HOEHLING, JR.,
Solicitors for said Defendants.

STATE OF OHIO, *Hamilton County,* } ss:

Before me, the undersigned, personally appeared Barbara Faul and Andrew Waesner, who, being by me first duly and severally sworn, on their respective oaths say:

That they have read the foregoing answer by them subscribed and know the contents thereof; that the several matters and things therein stated of their own knowledge are true, and those stated as upon information and belief they believe to be true.

BARBARA FAUL.

14 Subscribed and sworn to before me this 14th day of May, A. D. 1898.

[SEAL.] F. SANFORD BROWN,
Notary Public.

* * * * * * *

THE STATE OF OHIO, *Clermont County,* } ss:

Before me, the undersigned, personally appeared Andrew Waesner, who, being by me first duly sworn, on his oath says he has read
the foregoing answer by him subscribed and knows the con-
15 tents thereof; that the several matters and things therein stated of his own knowledge are true, and those stated as upon information and belief he believes to be true.

ANDREW WASNER.

Sworn to and subscribed before me this 16th day of May, A. D. 1898.

DAVID K. McDONALD,
[SEAL.] *Notary Public in and for Clermont County, Ohio.*

* * * * * * *

16 *Answer of the Young Women's Christian Home.*

Filed Oct. 22, 1898.

In the Supreme Court of the District of Columbia.

GEORGE W. HULICK ET AL. vs. YOUNG WOMEN'S CHRISTIAN HOME. } Equity. No. 18968.

The defendant, The Young Women's Christian Home, for answer to so much and such parts of the bill of complaint in the above-entitled cause as it is advised it is material for it to make answer unto, answering, says:

1, 2. It admits the residences of the parties and the capacity in which they sue and are sued to be as stated in the first and second paragraphs of the bill.

3. It further admits the death of Oliver Wheeler Rhodes, leaving Sophia Rhodes, his widow, and Eugene Rhodes, his son and only heir-at-law, surviving; that said survivors were then temporarily at Heidelberg, Germany, and that both of them were drowned at sea, as set forth in the third paragraph of the bill. It has no personal knowledge as to the recovery of their bodies or the body of either of them, and calls for proof thereof if material.

4. It is willing to admit, for the purposes of this suit, the allegations of the fourth paragraph of the bill as to the administration of the estate of Sophia Rhodes by the complainants.

5. This defendant is without knowledge as to how many and who were the next of kin and only heirs-at-law of Sophia Rhodes in case her son, Eugene Rhodes, did not survive her, nor as to who were his heirs-at-law and next of kin in case he did not sur-
17 vive her, and calls for strict proof thereof in so far as may be material, as of all the allegations of the sixth paragraph of the bill, none of which allegations relate to matters which are within the knowledge of this defendant.

6. It is willing to admit for the purposes of this suit that the defendant John L. French was duly appointed and qualified as executor of the estate of John Rhodes, deceased.

7. This defendant is advised and believes, and therefore avers, that the provisions of the will of said testatrix, taken as a whole, clearly shows her plain intention that unless her son, the said Eugene Rhodes, should survive her, so that he might be the beneficiary of her said will and enter upon and enjoy her estate, the same should pass, to the exclusion of all other persons whomsoever, to this defendant for the purposes of its organization, and it admits that it

claims the estate of the testatrix as the beneficiary which said testatrix plainly intended should receive and make use of the said estate under the conditions and circumstances set forth in said bill. It believes it to be true and is willing to admit for the purposes of this case that, notwithstanding the said plain intent of the testatrix upon the face of her said will, the defendants Wasner, Faul, and French have interposed conflicting claims to the said estate.

And, having fully answered, it prays that it be hence dismissed with its reasonable costs.

THE YOUNG WOMEN'S CHRISTIAN HOME.
By ELIZABETH H. GURLEY, *President.*

J. J. DARLINGTON,
JOHN B. LARNER,
Sol'rs for Def'd't.

18 DISTRICT OF COLUMBIA, *ss:*

I, Elizabeth H. Gurley, on oath say that I am the president of The Young Women's Christian Home, defendant in the above-entitled cause; that I have read the foregoing answer by it, acting as myself, its president, as aforesaid, and know the contents of the said answer, and that the allegations of the said answer are true to the best of my knowledge, information, and belief.

ELIZABETH H. GURLEY.

Subscribed and sworn to before me this 20th day of October, A. D. 1898.

CHARLES L. GURLEY,
[SEAL.] *Notary Public, Dist. of Columbia.*

Answer of John L. French, Administrator.

Filed Oct. 29, 1898.

In the Supreme Court of the District of Columbia.

GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes,
vs.
THE YOUNG WOMEN'S CHRISTIAN HOME, Barbara Faul, Andrew Waesner, and John L. French, Administrator.
} In Equity. No. 18968.

19 This defendant, John L. French, sole administrator of the estate of Eugene Rhodes, deceased, reserving the benefit of exception to the errors and insufficiencies in the bill of complaint, enters his appearance and for answer to said bill says:

1 & 2. On information and belief he admits the averments contained in the 1st and 2nd paragraphs of said bill.

3. He admits the averments in the 3rd paragraph of said bill ex-

cept so much thereof as alleges that the said Eugene Rhodes, son of Sophia Rhodes, lost his life "as the result of said collision and the foundering of said steamer" mentioned in the said paragraph. Whether said Eugene Rhodes lost his life as the result of said collision and foundering or whether he wholly escaped from that disaster in a lifeboat or otherwise and subsequently lost his life in some other disaster or from some other cause is not known to this defendant nor, so far as he is aware, to any other living person, but if said allegation is relied upon by the complainants or any other party to this suit this defendant asks for strict proof thereof.

4. On information and belief he admits the averments of the 4th paragraph of the bill excepting that this defendant states that on April 9th, 1896, he filed his bill of complaint, in equity, No. 17291, in this court, against the complainants in this cause to obtain from them as administrators *c. t. a.* an accounting in regard to all property in the hands of Sophia Rhodes at and before her death belonging to her husband, Oliver W. Rhodes, or to their son, the said Eugene Rhodes, which suit is still pending and may diminish the balance in the hands of said complainants.

5, 6, & 7. He admits the averments contained in the 5th, 6th,
20 and 7th paragraphs of said bill, except that he avers and submits to the court that it is the duty of said complainants to investigate and ascertain who are the rightful distributees of the estate of Sophia Rhodes, deceased, and that no burden of proof or affirmative action rests or is placed upon this defendant in regard to establishing the rights of Eugene Rhodes in the premises by the filing of the said bill of complaint.

And further answering, with this reservation, this defendant says that upon further investigation being made to ascertain the proper distributees it will appear as follows:

(*a.*) That, as he is informed and believes, said Sophia Rhodes and her son, Eugene Rhodes, engaged and occupied one state-room only on said steamer "Elbe," and said room was on the same side and the same deck of the "Elbe" and about eight feet abaft the point where the prow of the steamer "Craithie" penetrated the hull of the "Elbe."

(*b.*) That it is capable of proof, as this defendant is informed and believes, that said Eugene Rhodes was seen alive after his mother was last seen alive, and that he was seen alive on the deck of the steamer "Elbe," and that she was only seen coming out of her state-room and was not seen on deck after the collision.

(*c.*) That, as this defendant is informed, and therefore avers, said Eugene Rhodes was first proved to be dead by the finding of his body in the North sea, off the coast of Holland, on March 6, 1895, and that said body was not broken, crushed, or even bruised.

(*d.*) That said Sophia Rhodes was of corpulent figure and short-
winded in breathing, and at the time of her death was about
21 fifty-two years old; that said Eugene Rhodes had attained the age of twenty-three years, and, as this defendant is informed and believes, was rather a good swimmer.

This defendant, further answering, says:

(*e*.) That so far as he is aware, except by contrast of the age, sex, build, and health and capacity to swim of said Sophia Rhodes and her son, Eugene, and the facts that the said son was the last one of the two seen alive and that his body was found at the time stated and bore no marks of his being injured by the collision, no proof is obtainable showing in what order of time the deaths of said Sophia Rhodes and her son respectively occurred and even if both of said deaths did occur in the same disaster, and from the same cause (of which there is no certainty) there is no presumption in law on that account, as this defendant is advised, and therefore avers, that both persons died at the same instant of time. This defendant submits that the order of occurrence of the two deaths is of necessity left to be determined by those responsible for rightful distribution from what evidence the case affords, and that any burden of proof in this case rests where it would have rested had any alleged insufficiency of evidence not been foreseen.

This defendant further says that the preponderance of whatever evidence appears to be obtainable is in favor of the son's having survived his mother, and that on the doctrine of probabilities it is incredible, without positive proof, that they died exactly at the same instant of time.

(*f*.) This defendant further says that, as he is advised by counsel, whoever was the only next of kin and heir-at-law of said Sophia Rhodes at the time of her death succeeded presumptively
22 and had *prima facie* right to so much of her property as on the settlement of her estate and payment of her debts remained for distribution, the burden of proof resting on any legatee or devisee claiming any of said property as against such next of kin and heir-at-law; that the said Sophia Rhodes' son, Eugene, took her property, if he survived her, by act of the law and not by virtue of her will, for the reason that what the will sought to give him (his father having predeceased him and his mother) was the very same the law gave him as her sole next of kin and heir-at-law in case of her intestacy, and that title by law is considered to prevail to the exclusion of title by act of the parties.

Further answering, this defendant says:

(*g*.) That as Oliver Wheeler Rhodes predeceased his wife, the said Sophia Rhodes, and their son, Eugene, all the property and estate of said Sophia, by her last will and testament (Exhibit No. 1 to the bill of complaint), especially items 3 and 4 thereof, was devised and bequeathed to the "Young Women's Christian Home" only on the express condition that the death of said Eugene Rhodes took place "before" the death of his said mother, and that she became his "survivor;" and this defendant submits that until proof be made (which he verily believes can never be made) that said condition was fulfilled, namely, that said son died "before" his mother and she became his "survivor," the said property and estate can never pass to or vest in the said Young Women's Christian Home.

(*h*.) This defendant further says that down to a point of time later

than which no human knowledge or evidence exists respecting said Sophia Rhodes and her son, Eugene, the said Eugene, as this
23 defendant is informed and believes, was still in full life, health, and strength, and held his place of being, upon the death of his mother, not only her sole legatee and devisee, but also her sole *heir-at-law* and *next of kin*. All the other defendants herein stood more remote in these relations to her, and this position of advantage was not lost to the said Eugene and his representatives by reason of his death occurring in a relation of time to that of his mother, not perhaps absolutely ascertainable. The life of said Eugene in being, as aforesaid, would continue in contemplation and presumption of law, as this defendant submits, until the expiration of seven years thereafter, or until such earlier date at which his death may be proved to have occurred, by those interested in ascertaining it to have occurred earlier. To the best of the knowledge and belief of this defendant, there is not even a scintilla of evidence that said Eugene Rhodes predeceased or codeceased his said mother, Sophia, and therefore, in contemplation of law, said Eugene remained her sole legatee, devisee, heir-at-law, and next of kin at the time of her death.

(*i.*) This defendant further says that there is evidence to the contrary of the theory of simultaneous death of said Eugene and his mother, namely, his strength, age, sex, health, and ability to swim, and the incidents attending or following said collision, including the fact that said Eugene was seen alive after his mother was seen alive, and that in view of this evidence it would be against probability and reason to find *without evidence* that said Eugene and his mother died at the same instant, while the preponderance of proof is in favor of the survivorship of said Eugene.

(*j.*) This defendant further says that the case does afford
24 some evidence tending to show the order of occurrence of the deaths of said Eugene Rhodes and his mother, namely, the circumstances already referred to, and that though said evidence may not be sufficient, as this defendant submits, to shift the burden of proof from such of the defendants, if any, on whom said burden rests, said burden does not rest on this defendant; and if no burden of proof rests on any of the defendants, none of them having a *prima facie* right, then it must be determined from the evidence which one occurred of the three happenings possible in the case, namely, that said Eugene and his mother died at the same instant of time, or that she survived him, or that he survived her.

The premises considered, this defendant submits:

(1.) That the defendants Barbara Faul and Andrew Waesner are not entitled to the surplus or residue of the estate of said Sophia Rhodes, because if any time, no matter how infinitesimal, intervened between the death of said Sophia Rhodes and that of her son, her property vested either in her said son or in the said "Young Women's Christian Home;" and because said Barbara Faul and Andrew Waesner were not, in contemplation of law, next of kin or heirs-at-law of said Sophia Rhodes at the time of her death.

(2.) That in contemplation of law the death of said Eugene Rhodes did not occur "before" the death of said Sophia Rhodes, as provided for in item No. 1 of her will, and therefore the said Young Women's Christian Home is not entitled to her estate or to any part thereof.

(3.) That in contemplation of law the said testatrix did not become the "survivor" of her son, the said Eugene Rhodes, as provided for in item 4 of said will, and therefore the said Young
25 Women's Christian Home is not entitled to any part of said estate.

(4.) That as there is neither proof nor presumption that said Eugene Rhodes, who is known to have been in full life, health, and strength at and after said collision, ceased to live before or at the same time that his said mother died, he was in contemplation of law her sole legatee, devisee, heir-at-law, and next of kin at the time of her death.

This defendant therefore prays, if it be deemed necessary or proper for him to make any affirmative prayer for relief in the premises, that the complainants, as administrators *c. t. a.*, be decreed to make inquiry, ascertain from all the information accessible, and report how the surplus in their hands ought to be distributed, subject to the approval of this honorable court; whereupon it will appear, as this defendant submits, that said surplus should be distributed to him as the personal representative of the sole legatee, devisee, heir-at-law, and next of kin of said Sophia Rhodes, and that no proof or presumption exists or can be produced to oust him from that position or sustain any adverse claim, and he prays for such other or further relief as the case may require or to the court appears just.

JOHN L. FRENCH, *Adm'r.*

J. W. SMITH.
W. H. DENNIS.
Solicitors for Defendant J. L. French.

DISTRICT OF COLUMBIA:

26 I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof; that the matters and things therein stated of my own personal knowledge are true, and those stated upon information and belief I believe to be true.

JOHN L. FRENCH.

Sworn to and subscribed before me this 22nd day of August, 1898.
[SEAL.]
H. L. RUST,
Notary Public.

Agreed Statement of Facts.

Filed Jan. 22, 1900.

In the Supreme Court of the District of Columbia.

GEORGE W. HULICK and JOHN B. Larner, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased, Complainants.
vs.
THE YOUNG WOMEN'S CHRISTIAN Home, Barbara Faul and Andrew Waesner, and John L. French, Administrator of the Estate of Eugene Rhodes, Deceased, Defendants.

In Equity. No. 18968. Bill of Interpleader.

27 It is hereby stipulated and agreed by and between the counsel for the respective parties hereto, interpleaded herein as defendants in the above-entitled cause, that the following shall constitute an agreed statement of *facts* for the trial and determination of this case, the right being hereby expressly reserved to any or either of said parties to object to said admitted facts or any or either thereof upon the ground of the immateriality, irrelevancy, or incompetency thereof, but no objection shall be interposed as to the form of such proof.

Agreed Statement of Facts.

1.

That said Sophia Rhodes heretofore departed this life, as hereinafter more particularly set forth, leaving a last will and testament, a true copy of which is set forth in Exhibit No. 1 to complainants' bill, which said last will and testament has been duly admitted to probate and record by the order and decree of the supreme court of the District of Columbia, holding a special term for orphans' court business, and that the complainants are the duly appointed, qualified, and acting administrators *c. t. a.* of the estate of said Sophia Rhodes, deceased; that the said John L. French is the duly appointed, qualified, and acting administrator of the estate of Eugene Rhodes, deceased, who was the only child or descendant of said Sophia Rhodes, as well as the only child or descendant of her late husband, Oliver Wheeler Rhodes, and that the said Young Women's Christian Association is a corporation duly incorporated, organized, and existing in the District of Columbia.

2.

28 That the said Oliver Wheeler Rhodes departed this life in the District of Columbia on the 27th day of January, 1895; that his said wife and son were at that time in Heidelberg,

Germany: that, being advised of his extreme illness, they started for Bremen to take the next steamer home, receiving a cablegram announcing his death a few hours before they sailed; that they sailed on the steamer "Elbe" at three o'clock p. m. on Tuesday, January 29th, 1895, both occupying the same state-room; that about 5:30 o'clock the next morning, as the ship was going in a southwesterly direction and was about due west of The Hague, she collided with the steamer "Craithie," en route northwesterly from Rotterdam to Scotland, the point of penetration being on the same side and deck of the "Elbe" and about 8 feet abaft of the room occupied by the said testatrix and her son. In about 20 minutes thereafter the "Elbe" went down. One lifeboat, No. 3, got away with twenty-one survivors. Lifeboat No. 5, filled mostly with women, capsized on being lowered to the water and all of its occupants were lost except one Anna Bocker, hereinafter referred to, who succeeded in getting into boat No. 3. Six weeks thereafter, March 6, 1895, the said Eugene's body came up in a fishing net off the coast of Holland; the mother's body was never recovered.

3.

The testatrix was about 52 years of age at the time of her death, was corpulent of figure, and short-winded in breathing. Her son was about 23 years old, was rather a good swimmer, had never been married, and he died intestate.

4.

The said Sophia Rhodes' next of kin, if she survived her
29 said son, were and are her brother and sister, Andrew Waesner and Barbara Faul, defendants herein. If her said son survived her his next of kin were said Andrew Waesner and Barbara Faul, on his mother's side, and on his father's side John G. Rhodes, Melville D. Rhodes, and Mrs. Alice Fitch, brothers and sisters of his father. The said John G. Rhodes has since died, leaving a widow, Katherine Rhodes, of Georgetown, Ohio, and five children, viz., Mrs. Mary R. Story, of Cincinnati, Ohio; Mrs. Belle R. Latham, Burlington, Iowa; Miss Genevieve Rhodes, Cincinnati, Ohio; White Rhodes, Georgetown, Ohio, and John Rhodes, Nashville, Tennessee.

5.

That of the twenty-one persons known to have survived said shipwreck two only, Miss Anna Bocker and John Vevera, have any personal knowledge tending to show the respective movements and situation of the said Sophia Rhodes and Eugene Rhodes, her son, at the time of the disaster aforesaid and immediately preceding their death; and it is further agreed that said Anna Bocker, if produced as a witness on behalf of the defendant John L. French, would testify, and the following is to be taken as her deposition to the effect, that just after the collision she saw the testatrix come out of her cabin, clothed in a blanket over her night-dress, as if to see what the matter was, and that she, the witness, never saw the said Mrs.

Rhodes afterwards; that subsequently (certainly some minutes after) when she, Miss Boeker, went on deck she saw the said Eugene Rhodes just in front of her, and never saw him afterwards, and that the said John Vevera, if produced as a witness in behalf of said Waesner and Faul, would testify, and the following is to be taken as his deposition to that effect, that he is a resident of the city of Cleveland, county of Cuyahoga, Ohio,
30 residing at 339 Burton street; that he has lived in said city for 26 years last past; that from 1893 to 1896 he was a member of the board of county commissioners of Cuyahoga county, Ohio; that since the first day of January, 1896, he has been and now is in the real-estate and insurance business in the city of Cleveland; that he was in Europe in the latter part of 1894 and took passage to return to this country on the steamship "Elbe;" that on the night preceding the disaster to this ship he sat at the same table with a mother and son; that his attention was attracted to them, as they seemed so happy and as the mother seemed so much interested in the boy, and that shortly thereafter he learned that the name of the woman was Mrs. Sophia Rhodes, and that the young man was her son; that after the accident which occurred on January 30th, 1895, when every one was on the deck, he saw these parties on the left side of the boat. The mother had her arms thrown around the neck of her son in a grip that he thought she would never lose, and the son was endeavoring to put a shawl around her to protect her from the cold.

When affiant first came on the deck he went to the lifeboat on the right-hand side of the vessel, but found it filled with ladies, and no man was allowed to enter the boat, but after it left the vessel a short distance it was swamped. Affiant then fought his way over to the left-hand side, further to the rear; had to fight his way through a crowd of sailors who were keeping every one back. As he got to the side of the vessel a man was standing there with an ax. A friend of affiant's who immediately preceded him was struck down, but affiant succeeded in overcoming the man with the ax and jumped over the side of the vessel, and that he was the last
31 one to get into the lifeboat, and was cut by the ax on his wrist.

The time he saw Mrs. Rhodes and her son last was just prior to his jumping over the side of the vessel. Affiant further states that it would have been impossible for them to have gotten through the sailors, who were keeping everybody back; that he was the last one to get into the lifeboat, and at the time he got in he was the nineteenth man in the boat. They endeavored to throw him out of the boat, but they did not succeed.

Affiant further says that he is positive that Mrs. Rhodes and her son remained together on the deck, as the boat in which he succeeded in escaping was the last one to leave the ship; that the scene made an impression on his mind that he will never forget; that after the boat in which he had gotten was some distance away the ship went down with a lurch and every one on board was drowned; that

both of these parties died together, and, so far as this affiant was able to learn, after he saw these parties on the deck clasped in an embrace that would never be loosened until after death, no one else saw them; that he has no interest in this case and his acquaintance with the parties was simply by reason of his attention being attracted to them and the fact that when he last saw them the mother and son were standing in the manner he has stated.

J. M. WILSON AND
A. A. HOEHLING, JR.,
Solicitors for Barbara Faul and Andrew Waesner.
J. W. SMITH AND
W. H. DENNIS,
Solicitors for J. L. French, Adm'r of Eugene Rhodes, Dec'd.
J. J. DARLINGTON,
JOHN B. LARNER,
Sol's for Def'dt Y. M. Christian Home.

32 *Stipulation to Hear Causes Together.*

Filed Jan. 22, 1900.

In the Supreme Court of the District of Columbia.

GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased, Complainants,
vs.
THE YOUNG WOMEN'S CHRISTIAN HOME, Barbara Faul and Andrew Waesner, and John L. French, Administrator of the Estate of Eugene Rhodes, Deceased, Defendants.
} In Equity. No. 18968. Bill of Interpleader.

and

JOHN L. FRENCH, Administrator, Complainant,
vs.
HULICK and LARNER, Administrators *c. t. a.*, Defendants.
} In Equity. No. 17291.

It is hereby stipulated and agreed that these two cases may be heard together.

J. M. WILSON,
A. A. HOEHLING, JR.,
Solicitors for Barbara Faul and Andrew Waesner.
J. W. SMITH AND
W. H. DENNIS,
Solicitors for J. L. French, Adm'r of Eugene Rhodes, Dec'd.
J. J. DARLINGTON,
JOHN B. LARNER,
Sol's for Y. M. C. Home.

December 2, 1899.

33 COMPLAINANTS' EXHIBIT No. 1.

Filed Feb. 27, 1900.

Last Will and Testament.

In the name of the bountiful Giver of all. Amen.

I, Sophia Rhodes, of the city of Hutchinson, in the State of Kansas, temporarily residing at Washington, in the District of Columbia, being now of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking all former wills or testamentary dispositions of my property.

I now dispose of the property and estate which it has pleased Almighty God to intrust to me, as follows, viz:

Imprimis. I will that all my just debts and funeral expenses shall be paid by my executor hereinafter named, out of the first money from my estate that shall come into his hands.

Item 1. I give, devise and bequeath unto my husband Oliver Wheeler Rhodes, during his life one-half (½) of the income from all my properties and estate in the next following item of this last will and testament disposed of, to be paid over to him from time to time by my executor hereinafter named, who, for this purpose, shall also act as trustee.

Item 2. I now give, devise and bequeath unto my only and beloved son, Eugene Rhodes, all my property, real, personal and mixed, of whatsoever nature, kind or description, including moneys, credits and evidences of indebtedness of which I may be possessed at the time of my death, to be his absolutely, to hold and to dispose of as unto him may seem good and proper, and subject only

34 to the provisions of item 1 of this last will and testament.

Item 3. In the event of the death of my son, Eugene Rhodes,

(Three (3) pages—page 1.)

before the decease either of myself or of my husband, I then give, devise and bequeath all my property, everything I own on earth, as follows, viz:

1st. I give, devise and bequeath all my pictures and paintings to the Young Women's Christian Home, in the city of Washington, District of Columbia. It is my will that the said pictures and paintings may, so long as the said home shall exist, be the ornaments of the said home, with my name as the giver connected with them during that time.

2nd. All the rest and residue of my property, real personal and mixed, I give, devise and bequeath to Michael H. Fitch, of Pueblo, Colorado, to have and to hold, in trust nevertheless, to invest the same to the best of his knowledge and experience, and to pay over the rents and profits arising therefrom to my husband, Oliver Wheeler Rhodes, during his, my said husband's life; and on the death of my said husband to turn over the said property, moneys, etc., with what-

soever accumulation thereon may be existing, to the Young Women's Christian Home, of Washington, in the District of Columbia, to be the property of the said home absolutely.

Item 4. In the event of my becoming the survivor of both my husband Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I then, give, devise and bequeath all my property, real personal and mixed, of whatsoever nature, kind or description, to the Young Women's Christian Home, of the city of Washington, in the
35–40 District of Columbia, to have and to hold the same absolutely and forever, for the good of that institution. It is my will that my pictures and paintings shall be disposed of in this event as provided in paragraph 1st, of item 3, of this last will and testament.

(Three (3) pages, page 2.)

Lastly. I hereby constitute and appoint my only son, Eugene Rhodes, the sole executor and trustee of this my last will and testament: and it is my will that my said sole executor and trustee shall administer and execute this last will and testament without giving bond therefor.

In testimony whereof, I, the said Sophia Rhodes, have hereunto set my hand and seal, at the city of Washington, in the District of Columbia, this tenth day of May, A. D. 1894.

SOPHIA RHODES. [SEAL.]

The foregoing last will and testament was signed, sealed, published, and declared by Sophia Rhodes, well known to each of us, as and for her last will and testament, in our presence, who, at her request and in her presence and in the presence of each other, have hereunto subscribed our names as witnesses this tenth day of May, A. D. 1894.

A. N. ROBINSON,
#326 *E Street N. E.*
A. C. GLANCY,
#326 *E Street N. E.*
LOUISE R. GLANCY,
#326 *E Street N. E.*

(Three (3) pages, page 3.)

* * * * * * *

41–43 Balance for distribution..... 14,891 89

Consisting of notes & interest.....	$11,194 44
Pictures & frames.....	250 00
Cash.....	3,447 45
	$14,891 89

GEO. W. HULICK,
JOHN B. LARNER, *Adm'rs.*

44 *Decree.*

Filed May 29, 1900.

In the Supreme Court of the District of Columbia.

GEO. W. HULICK ET AL., Adm'rs, *c. t. a.*, Estate of Sophia Rhodes,
vs.
THE YOUNG WOMEN'S CHRISTIAN HOME ET AL. } No. 18968. Equity.

This cause coming on to be heard upon the bill, the answers, and the stipulation between the parties in said cause, it is thereupon by the court, this 29th day of May, A. D. 1900, adjudged, ordered, and decreed that the defendant The Young Women's Christian Home is entitled, as devisee and legatee under will of Sophia Rhodes, to all the property, real, personal, and mixed, of whatsoever nature, kind, or description, of the said testatrix, and that the complainants, George W. Hulick and John B. Larner, administrators *cum testamento annexo* of said testatrix, account for and pay over to the said defendant, The Young Women's Christian Home, all assets of the said estate which have come or shall hereafter come into their hands as administrators as aforesaid.

It is further ordered that the costs of this cause and the costs of clerk and marshal & depositions in No. 17291 be paid out of the assets of the estate of said Sophia Rhodes by the administrators.

JOB BARNARD, *Justice.*

45 From this decree the defendants Barbara Faul and Andrew Waesner and John L. French, adm'r, in open court, severally pray an appeal to the Court of Appeals; which is allowed, and the appeal bond fixed at one hundred dollars.

JOB BARNARD, *Justice.*

Memorandum.

June 6, 1900.—Appeal bond filed.

Memorandum.

June 19, 1900.—Appeal bond of John L. French, adm'r, filed.

46 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } *ss:*
District of Columbia, }

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 45, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 18968, equity, wherein George W. Hulick *et al.* are com-

plainants and The Young Women's Christian Home *et al.* are defendants, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 22d day of June, A. D. 1900.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

47 Court of Appeals of the District of Columbia.

BARBARA FAUL and ANDREW WASNER ET AL., Appellants,
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators, etc., *et al.*, Appellees.
No. 1010.

The clerk in printing the transcript of record in the above-entitled cause will please omit the following portions thereof:

Certificate of E. R. Monfort, clerk, on page 14.

Certificate of H. A. Rice, clerk, on page 15.

All of pages 36, 37, 38, and 39.

All of page 40.

All of page 41 except the words "Balance for distribution, $14,891.89," and last four lines on page.

All of pages 42 and 43.

J. M. WILSON,
A. A. HOEHLING, JR.,
Attorneys for Barbara Faul and Andrew Wasner, Appellants.

Assignment of Errors.

The assignment of errors of Barbara Faul and Andrew Wasner, parties appellant.

The court erred as follows:

1. In holding and deciding that in construing the will of Sophia Rhodes, deceased, it is permissible to add to such will and to insert therein a condition and contingency not therein provided for by the testatrix, and in giving effect to the will as so altered and its terms and provisions so enlarged, as herein stated.

2. In holding and deciding that the heirs-at-law and next of kin of said decedent can be disinherited without express devise and the estate of said decedent diverted from such heirs-at-law and
48 next of kin to a stranger in blood, The Young Women's Christian Home, a corporation, party appellee herein.

3. In failing to hold and decide that the said Sophia Rhodes died intestate, and that her property and estate descended to these appellants as her only heirs-at-law and next of kin.

4. In holding and deciding that the moneys and property in the hands of the complainants in interpleader herein should be paid to the legatee named in the will, to wit, to the home aforesaid, and this

notwithstanding the fact that such devise was one upon and express condition and contingency, therein named, and which condition and contingency did not happen.

5. In failing to hold and decide that the devise to the said home in said will contained was one upon an express condition and contingency, and that such condition and contingency did not happen.

6. In failing to hold and decide that these appellants, as such heirs-at-law and next of kin of said decedent, are entitled to the moneys and property of decedent so embraced in said bill of interpleader.

7. The court further erred in entering a decree herein awarding to the said home, party appellee herein, all the moneys, property, and estate of said decedent, such decree being beyond the power and jurisdiction of the court, because (*a*) not embraced in said bill of interpleader, except as to certain moneys and evidences of indebtedness in the hands of said complainants in interpleader; (*b*) certain property of decedent consists of real estate situate outside of the jurisdiction of said court and over which it had no control or jurisdiction, the same being governed by the laws of the place where so situate and not otherwise, and because (*c*), the same not being properly involved in this case, the court had jurisdiction neither of said subject-matter nor of the parties, and as to which the latter are entitled to their day in court.

8. Other errors appearing in the record and decree herein.

J. M. WILSON,
A. A. HOEHLING, JR.,
Attorneys for Barbara Faul and Andrew Wasner, Parties Appellant.

49 (Endorsed:) No. 1010. Court of Appeals D. C., April term, 1900. Barbara Faul *et al.*, appellants, *vs.* George W. Hulick *et al.* Appellants' (Faul & Wasner) assignment of errors and designation of parts of record to be printed. Court of Appeals, District of Columbia. Filed Jul- 24, 1900. Robert Willett, clerk.

50 In the Court of Appeals of the District of Columbia.

BARBARA FAUL and ANDREW WAESNER ET AL., Appellants, *vs.* GEORGE W. HULICK and JOHN B. LARNER, Adm'rs, etc., *et al.*	No. 1010.

On appeal from the supreme court of the District of Columbia.

Assignment of Errors on the Part of John L. French, Administrator, Party Appellant.

The court erred as follows:

1. In deciding that the evidence was insufficient to show that the son of the said Sophia Rhodes survived his mother.

2. In failing to decide that as the law presumed in favor of no one of the three happenings possible (that the son, the mother, or neither, survived the other), election among them was to be made upon the evidence obtainable, and that the preponderance of that evidence was in favor of the son's survival.

3. In failing to decide that the burden of proof lay on the other defendants below to show that the testatrix's son, who, the last known of him, was her nearest relative and the beneficiary preferred by her will, had ceased to exist at the time of her death.

4. In deciding that the law presumes either that the testatrix survived her son or that he and she died on the very same instant.

5. In not deciding that (*a*) as between said home, as legatee, the testatrix's next of kin (if not her son, then her brother and sister), the law presumes that her property devolved at her death on her next of kin, and therefore put the burden of proof on the home to show that that contingency actually took place upon which the will diverted said property from such next of kin to said home, and that (*b*) as to which was testatrix's next of kin at time of her death—her son or her brother and sister—the burden of proof lay on
51 latter to show that the son's life, standing in kin between them and testatrix the last that was known of it, had passed therefrom at time of her death, leaving them next to her in kin.

6. In deciding that according to the law of this District "the heirs-at-law and next of kin of Mrs. Sophia Rhodes, *who are known to have survived her*, would take her estate in the absence of any valid testamentary disposition by her."

7. In deciding that it was judicially and metaphysically possible, in the absence of proof of the simultaneous death of testatrix and her son, to dispose of her property on the theory that said two deaths were simultaneous *without* "presuming" that they were.

8. In construing testatrix's will as passing her property to the said home without first finding as a fact that one or the other did happen of the only two contingencies under which the will could have had that effect, viz., that her son predeceased her, or that he and she died on the same instant.

9. In deciding that the will passed the property to the home, appellee, in the event of its being unascertainable whether the two deaths in question took place on the same instant or not.

10. Even assuming that the said Sophia Rhodes died completely testate, the court below erred in putting the burden of proof on the part of the preferred legatee, the son, instead of on the deferred and substituted legatee, the home, to prove the fact on which their respective claims rested.

11. The original bill of complaint herein did not extend to real estate in Kansas and Colorado that said Sophia Rhodes died seized and possessed of, nor did it make her son's paternal heirs-at-law parties to this suit, and therefore the decree entered below contains error in that it assumes to award to the said home, appellee herein, *all* the

money, property, and *estate*, wherever situated, of the said Sophia Rhodes.

J. W. SMITH,
WM. HENRY DENNIS,
Attorneys for John L. French, Adm'r, Party Appellant.

52 (Endorsed:) No. 1010. Court of Appeals D. C., April term, 1900. Barbara Faul *et al.*, appellants, *vs.* George W. Hulick *et al.* Assignment of errors on part of John L. French, adm'r, party appellant. Court of Appeals, District of Columbia. Filed Aug. 3, 1900. Robert Willett, clerk.

53 In the Court of Appeals of the District of Columbia.

BARBARA FAUL ET AL., Appellants,
vs.
THE YOUNG WOMEN'S CHRISTIAN HOME *et al.*, Appellees. } No. 1010.

Stipulation of Counsel.

It is hereby stipulated and agreed by and between counsel for the appellants and appellees, respectively, that the printed copy of opinion of Mr. Justice Barnard, heretofore rendered in the above-entitled cause and hereto attached, may be attached to the record on appeal now on file in this court, and printed, together with this stipulation, as a part of the record in said cause.

J. W. SMITH,
J. M. WILSON,
A. A. HOEHLING, JR.,
Attorneys for Appellants.
J. J. DARLINGTON,
Attorney for Appellees.

54 *Opinion.*

Supreme Court of the District of Columbia.

JOHN L. FRENCH, Adm'r, etc.,)
v.
GEO. W. HULICK ET AL., Adm'rs *c. t. a.*)

GEO. W. HULICK ET AL., Adm'rs *c. t. a.*,)
v.
THE YOUNG WOMEN'S CHRISTIAN HOME ET AL.)

In equity. Nos. 17291 and 18968. Decided May 28, 1900.

Hearing on bill in equity to require defendants to pay over to complainant an alleged trust fund, and on a bill of interpleader, the two cases being heard together.

Mr. J. W. Smith and *Mr. W. H. Dennis* for French *et al.*
Mr. A. A. Hochling, Jr., for Faul *et al.*
Mr. J. J. Darlington and *Mr. John B. Larner* for Hulick *et al.*

Mr. Justice BARNARD delivered the opinion of the court:

The bill in the first of these cases was filed April 9, 1896, and in the second case, January 19, 1898, and the two cases were heard together by agreement of counsel.

The bill in No. 17291 asks that the defendants be decreed to pay over to the complainant the funds held by them, claiming $1,000 to be a trust fund which said Sophia Rhodes, mother of said Eugene Rhodes, held for him; and claiming the balance received by defendants as arising from estate of Oliver W. Rhodes, the father of complainant's intestate.

In No. 18968, the bill is in the nature of a bill of interpleader, the administrators *c. t. a.* of Sophia Rhodes asking that the estate of Eugene Rhodes, and the Young Women's Christian Home, as legatee of Mrs. Sophia Rhodes, and Barbara Faul and Andrew Wasner, her brother and sister, as next of kin, interplead among themselves, and establish their claims to the fund by complainants.

55 By stipulation filed in the case the following facts appear: Oliver Wheeler Rhodes departed this life in this District, January 27, 1895, at which time his wife, said Sophia Rhodes, and their only child, said Eugene Rhodes, were in Heidelberg, Germany. They were starting home, when they received a cablegram announcing his death; and they sailed from Bremen on the steamer "Elbe" at 3 o'clock, p. m., on Tuesday, January 29, 1895. About half past five o'clock the next morning, when about due west from The Hague, the steamer collided with another steamer, the "Craithie," going from Rotterdam to Scotland, the "Elbe" being struck on the same side and about eight feet abaft of the state-room occupied by mother and son, and sank in about twenty minutes after the collision. Six

weeks afterwards, March 6, 1895, the body of said Eugene Rhodes came up in a fishing net off the coast of Holland, but his mother's body was never recovered. She was about 52 years old, corpulent and short-winded in breathing; and her son was about 23 years old, a single man, and was rather a good swimmer. He died intestate, and his next of kin, in case he survived his mother, were his uncle and aunt on his mother's side, Andrew Wasner and Barbara Faul, and uncles and aunt on his father's side, John G. Rhodes, Melville D. Rhodes and Mrs. Alice Fitch; said John G. Rhodes has since died, leaving a widow and five children surviving. In case Mrs. Sophia Rhodes had survived her said son, her next of kin were her said brother and sister, the defendants, Andrew Wasner and Barbara Faul.

Of the twenty-one persons who survived the said shipwreck, only two have any knowledge of the said mother and son at the time of the disaster. One of these, Anna Bocker, saw Mrs. Rhodes come out of her cabin just after the collision, with a blanket over her night dress, and some minutes later said Anna Bocker saw said Eugene Rhodes just in front of her as she went on deck, and she never saw either of them afterwards. The other, John Vevera, of Cleveland, Ohio, real-estate agent, and formerly a county commissioner, on the night preceding the disaster, sat at the same table with the mother and son; and next day, after the collision, when every one was on deck, he saw them on the left side of the boat, the son endeavoring to put a shawl around his mother, and she with her arms thrown around her son's neck. This witness was the last one to get into the lifeboat, and that was the last to leave the ship; and when it had gotten some distance away, the ship went down with a lurch, and every one on board was drowned.

The complainants in No. 18968 file a copy of their first account as administrators *c. t. a.* of the estate of said Sophia Rhodes, which shows a balance in their hands for distribution of $14,891.98; and the court is asked to decide who is entitled to receive this estate.

Before undertaking to answer this question, I will state, that in my opinion, the complainant in said first cause, No. 17291, has failed to produce sufficient evidence to impress a trust in favor of said Eugene Rhodes, upon any portion of this fund, and failed also to satisfy my mind that any part of said fund legally belongs to the estate of Oliver W. Rhodes. I will, therefore, consider it to belong to the said Sophia Rhodes at the time of her decease, and subject to be disposed of by her will, if she left a will that can be held operative under the circumstances of this case.

Counsel representing the parties claiming this fund, have been most exhaustive in their researches, and have aided the court very much by their interesting arguments and able briefs. From a careful study of the various authorities cited, I am of the opinion that there is no presumption which the court can bring to its aid in a case like this, by which to determine who is the survivor of two persons who are lost in a common disaster, such as the wreck of a ship, and the drowning of all who are on board at the time the

vessel sinks into the sea. If there is no proof to show who survives, the rule seems to be this, that property belonging to either of them must be disposed of by will, or the laws of descent and distribution, as if they both died at the same time. There is no presumption that either survived the other, and no presumption that they died at the same moment, but as the order of their death cannot be shown, some plan must be decided upon in the absence of any definite proof, for the succession to their estates; and, so the courts say they will act as if there was proof or presumption that their deaths occurred at the same time, and that neither one survived the other. Cowman *v.* Rogers, 73 Md., 403; Johnson *v.* Merriwether, 80 Me., 111.

Adopting this principle, the conclusion would seem to follow that the heirs-at-law and next of kin of Mrs. Sophia Rhodes who are known to have survived her, would take her estate in the absence of any valid testamentary disposition by her. She left a will, however, executed on the 10th day of May, 1894, which has been duly admitted to probate in this court holding a special term for orphans' court business, and her administrators *c. t. a.* now have her estate in hand by virtue of said will. The first question, therefore, is, does the will dispose of the property left by Mrs. Rhodes?

In order to gather the meaning of this will, and to ascertain, if possible, what the real intention of the testatrix was in executing it, I will read it in full, except the formal words at the beginning and ending:

"I, Sophia Rhodes, of the city of Hutchinson, in the State of Kansas, temporarily residing at Washington, in the District of Columbia, being now of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking all former wills or testamentary dispositions of my property.

"I now dispose of the property and estate which it has pleased Almighty God to entrust to me, as follows, viz:

"*Imprimis:* I will that all my just debts and funeral expenses shall be paid by my executor hereinafter named, out of the first money from my estate that shall come into his hands.

"Item 1: I give, devise and bequeath unto my husband, Oliver Wheeler Rhodes, during his life, one-half ($\frac{1}{2}$) of the income from all my properties and estate in the next following item of this
56 last will and testament disposed of, to be paid over to him from time to time by my executor hereinafter named, who, for this purpose, shall also act as trustee.

"Item 2: I now give, devise and bequeath unto my only and beloved son, Eugene Rhodes, all my property, real, personal and mixed, of whatsoever nature, kind or description, including moneys, credits and evidences of indebtedness of which I may be possessed at the time of my death, to be his absolutely, to hold and to dispose of as unto him may seem good and proper, and subject only to the provisions of item 1 of this last will and testament.

"Item 3: In the event of the death of my son, Eugene Rhodes, before the decease either of myself or of my husband, I then give,

devise and bequeath all my property, everything I own on earth, as follows, viz:

"1st. I give, devise and bequeath all my pictures and paintings to the Young Women's Christian Home, in the city of Washington, District of Columbia. It is my will that the said pictures and paintings may, so long as the said home shall exist, be the ornaments of the said home, with my name as the giver connected with them during that time.

"2nd. All the rest and residue of my property, real, personal and mixed, I give, devise and bequeath to Michael H. Fitch, of Pueblo, Colorado, to have and to hold, in trust nevertheless, to invest the same to the best of his knowledge and experience, and to pay over the rents and profits arising therefrom to my husband, Oliver Wheeler Rhodes, during his, my said husband's life; and on the death of my said husband to turn over the said property, moneys, etc., with whatsoever accumulation thereon may be existing, to the Young Women's Christian Home, of Washington, in the District of Columbia, to be the property of the said home absolutely.

"Item 4. In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I then give, devise and bequeath all my property, real, personal and mixed, of whatsoever nature, kind or description, to the Young Women's Christian Home of the city of Washington, in the District of Columbia, to have and to hold the same absolutely and forever, for the good of that institution. It is my will that my pictures and paintings shall be disposed of in this event as provided in paragraph 1st of item 3, of this last will and testament.

"Lastly: I hereby constitute and appoint my only son, Eugene Rhodes, the sole executor and trustee of this, my last will and testament; and it is my will that my said sole executor and trustee shall administer and execute this last will and testament without giving bond therefor."

It seems to me that any one reading this will for the first time, would gain some general idea of what the testatrix wished to have understood by the language used, such as this, briefly speaking:

She wished to dispose of her entire estate; to provide for her husband by securing to him an income only; to confide in, and provide for her son by leaving him the estate absolutely, subject only to the husband's income for life; and to make him her executor and trustee. Then it seems to have occurred to her that her son might die; in that event, she changes the provision for her husband, for his life, and leaves the estate to the Young Women's Christian Home at his death. Then, as if struck with another idea, that her son and husband might both die, she provides in that case that the estate go at once to said charitable institution.

She says, in the fourth item: "In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes," the property is to go to the home; but what she intends by these words, taking the whole will together, might be more accurately expressed in this form: "In the event that neither

my husband nor my son shall survive me," then the whole estate to vest in the home. The possibility of death occurring to all three or to any two of them at the same moment was so remote that she never thought of that contingency, or of any consequence to follow it. She only had three persons in mind as the objects of her bounty, her husband, her son, and said home; and she supposed she had covered every contingency by the careful wording used; for if her husband and son could not live to receive the estate, the home, being a corporation, and therefore in no danger of death, would be sure to receive it. What she appears to have been anxious to guard against was the lapsing of the legacies to her husband and son, in the event of the death of either before her death.

If the words of the fourth item are read by themselves, and given their literal meaning, it must be held that the contingency therein named has not been shown to have happened; and, therefore, her bequest to the home would fail; but no such intent can be inferred, if you look at the whole will, and the situation of the testatrix when the will was executed, as shown by the testimony—an improvident husband, for whom she had an affectionate solicitude; an educated, careful, trustworthy young son; an apparently warm interest in a charity in which she wished her name to be remembered.

Such, evidently, being the meaning naturally to be gathered from the whole will and the surrounding circumstances, are the established rules of construction broad enough to enable the court to properly and legally read the paper as if she had supplied the other alternative thus: "or in the event that my husband and son die at the same time with me," then to the home; or better still, "in the event that my husband and son do not survive me," then to the home.

Chief Justice Marshall, in delivering the opinion of the court in the case of Finlay *v.* King's Lessee, 3 Peters, 376, uses the following language: "The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail; although, in giving effect to it some words should be rejected, or so restrained in their application as materially to change the literal meaning of the particular sentence."

The court is authorized to occupy the same standpoint as that of the testator, in order to discover from a view of all the circumstances as they existed when the will was made, what the
57 testator intended to be understood by the words used by him. Lee *v.* Simpson, 134 U. S., 572. When this intention is ascertained it will prevail when not inconsistent with rules of law. Colton *v.* Colton, 127 U. S., 300.

In the case of Clark *v.* Boorman's Executors, 18 Wall., 502, Justice Miller used this language: "Very few classes of questions are more frequent or more perplexing in the courts than the construction of wills. If rules of construction laid down by the courts of the highest character, or the authority of adjudged cases, could meet and solve these difficulties, there would remain no cause of complaint

on that subject, for such is the number and variety of these opinions that every form of expression would seem to be met. * * * Unfortunately, however, these authorities are often conflicting, or arise out of forms of expression so near alike, yet varying in such minute shades of meaning, and are decided on facts or circumstances differing in points, the pertinency of which are so difficult in their application to other cases, that the mind is bewildered and in danger of being misled. To these considerations it is to be added that of all legal instruments, wills are the most inartificial, the least to be governed in their construction by the settled use of technical legal terms, the will itself being often the production of persons not only ignorant of law, but of the correct use of the language in which it is written. Under this state of the science of the law, as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of much assistance than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself."

If we read this will of Mrs. Rhodes, can we gain any impression from it by any words therein, that she intended, under any contingency whatever, to die intestate? If she did die intestate, it would seem to be directly the opposite of what she intended. The estate was under her control and dominion while she lived, and what she evidently meant by her will, taken as a whole, was this: That if her husband and son could not survive her so as to have the use and benefit of the property, and the same remained under her control at the time of her death, when the will speaks, then it should go absolutely to the charity she had named. Robinson *v.* Portland Orphan Asylum, 123 U. S., 702; Aulick *v.* Wallace, 12 Bush., 531; Doe Dem. Leach *v.* Micklen, 6 East., 486; Metcalf *v.* Framingham Parish, 128 Mass., 370.

Having been unable to find that Mrs. Rhodes died intestate, there is no necessity to determine who would succeed to her estate in that event, and I need not, therefore, prolong this opinion.

I will sign a decree awarding the property in the hands of the complainants in No. 18968 to the legatee named in the will, and dismissing the bill in No. 17291.

58 [Endorsed:] Court of Appeals D. C., April term, 1900. No. 1010. Barbara Faul *et al.*, appellants, *vs.* George W. Hulick *et al.* Addition to record per stipulation of counsel. (Opinion of court.) Court of Appeals, District of Columbia. Filed Oct. 1, 1900. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1010. Barbara Faul *et al.*, appellants, *vs.* George W. Hulick *et al.* Court of Appeals, District of Columbia. Filed Jul- 23, 1900. Robert Willett, clerk.

THURSDAY, *January* 17*th*, A. *D.* 1901.

BARBARA FAUL, ANDREW WASNER, and JOHN L. FRENCH, Administrator of Eugene Rhodes, Deceased, Appellants.
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased; The Young Women's Christian Home.
No. 1010.

The argument in the above-entitled cause was commenced by Mr. A. A. Hoehling, Jr., attorney for the appellants Barbara Faul and Andrew Wasner, and was continued by Mr. Wm. H. Dennis, attorney for the appellant John L. French, administrator, and by Mr. J. J. Darlington, attorney for the appellees, and by Mr. J. W. Smith, attorney for the appellant, John L. French, administrator.

FRIDAY, *January* 18*th*, A. *D.* 1901.

BARBARA FAUL, ANDREW WASNER, and JOHN L. FRENCH, Administrator of Eugene Rhodes, Deceased, Appellants.
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased; The Young Women's Christian Home.
No. 1010.

The argument in the above-entitled cause was concluded by Mr. J. W. Smith, attorney for the appellant John L. French, administrator.

BARBARA FAUL, ANDREW WASNER, and JOHN L. FRENCH, Administrator of Eugene Rhodes, Deceased, Appellants.
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased; The Young Women's Christian Home.
No. 1010.

Opinion.

Mr. Justice SHEPARD delivered the opinion of the court:

This case began with a bill of interpleader filed by the administrators, with the will annexed, of the estate of Sophia Rhodes, deceased. After the payment of all claims there remained in the hands of the administrators a fund of $14,891.89 for distribution. Of this there were three sets of claimants, namely, the Young Women's Christian Home, a corporation of the District created by act of Congress; the next of kin of said Sophia Rhodes; and the administrator of the estate of Eugene Rhodes, deceased.

The will of Sophia Rhodes, after providing for the payment of debts, etc., and for an income for her husband Oliver Wheeler Rhodes, contained the following items:

"Item 2. I now give, devise and bequeath unto my only and beloved son, Eugene Rhodes, all my property, real, personal and mixed,

of whatsoever nature, kind or description, including moneys, credits and evidences of indebtedness of which I may be possessed at the time of my death, to be his absolutely, to hold and to dispose of as unto him may seem good and proper, and subject only to the provisions of item 1 of this last will and testament.

"Item 3. In the event of the death of my son, Eugene Rhodes, before the decease either of myself or of my husband, I then give, devise and bequeath all my property, everything I own on earth, as follows, viz:

"1st. I give, devise and bequeath all my pictures and paintings to the Young Women's Christian Home, in the city of Washington, District of Columbia. It is my will that the said pictures and paintings may, so long as the said home shall exist, be the ornaments of the said home, with my name as the giver connected with them during that time.

"2nd. All the rest and residue of my property, real personal and mixed, I give, devise and bequeath to Michael H. Fitch, of Pueblo, Colorado, to have and to hold, in trust nevertheless, to invest the same to the best of his knowledge and experience, and to pay over the rents and profits arising therefrom to my husband, Oliver Wheeler Rhodes, during his, my said husband's life; and on the death of my said husband to turn over the said property, moneys, etc., with whatsoever accumulation thereon may be existing, to the Young Women's Christian Home, of Washington, in the District of Columbia, to be the property of the said home absolutely.

"Item 4. In the event of my becoming the survivor of both my husband Oliver Wheeler Rhodes and of my son, Eugene Rhodes, I then, give, devise and bequeath all my property, real personal and mixed, of whatsoever nature, kind or description, to the Young Women's Christian Home, of the city of Washington, in the District of Columbia, to have and to hold the same absolutely and forever, for the good of that institution. It is my will that my pictures and paintings shall be disposed of in this event as provided in paragraph 1st, of item 3, of this last will and testament.

"Lastly, I hereby constitute and appoint my only son, Eugene Rhodes, the sole executor and trustee of this my last will and testament; and it is my will that my said sole executor and trustee shall administer and execute this last will and testament without giving bond therefor."

The case was submitted on the hearing below upon an agreed statement of facts, from which it appears:

1. That Eugene Rhodes was the only child or descendant of Sophia Rhodes and Oliver W. Rhodes, and John L. French is the duly appointed administrator of his estate.

"2. That the said Oliver Wheeler Rhodes departed this life in the District of Columbia on the 27th day of January, 1895; that his said wife and son were at that time in Heidelberg, Germany; that, being advised of his extreme illness, they started for Bremen to take the next steamer home, receiving a cablegram announcing his death a few hours before they sailed; that they sailed on the steamer 'Elbe' at 3 o'clock p. m., on Tuesday, January 29th, 1895

both occupying the same state-room; that about 5.30 o'clock the next morning, as the ship was going in a southwesterly direction and was about due west of The Hague, she collided with the steamer 'Craithie,' en route northwesterly from Rotterdam to Scotland, the point of penetration being on the same side and deck of the 'Elbe' and about 8 feet abaft of the room occupied by the said testatrix and her son. In about 20 minutes thereafter the 'Elbe' went down. One life-boat, No. 3, got away with twenty-one survivors. Life-boat No. 5, filled mostly with women, capsized on being lowered to the water and all of its occupants were lost except one Anna Bocker, hereinafter referred to, who succeeded in getting into boat No. 3. Six weeks thereafter, March 6, 1895, the said Eugene's body came up in a fishing net off the coast of Holland; the mother's body was never recovered.

"3. The testatrix was about 52 years of age at the time of her death, was corpulent of figure, and short-winded in breathing. Her son was about 23 years old, was rather a good swimmer, had never been married, and he died intestate.

"4. The said Sophia Rhodes' next of kin, if she survived her said son, were and are her brother and sister, Andrew Waesner and Barbara Faul, defendants herein. If her said son survived her his next of kin were said Andrew Waesner and Barbara Faul, on his mother's side, and on his father's side John G. Rhodes, Melville D. Rhodes, and Mrs. Alice Fitch, brothers and sisters of his father. The said John G. Rhodes has since died, leaving a widow, Katherine Rhodes, of Georgetown, Ohio, and five children, viz., Mrs. Mary R. Story, of Cincinnati, Ohio; Mrs. Belle R. Latham, Burlington, Iowa; Miss Genevieve Rhodes, Cincinnati, Ohio; White Rhodes, Georgetown, Ohio, and John Rhodes, Nashville, Tennessee.

"5. That of the twenty-one persons known to have survived said shipwreck two only, Miss Anna Bocker and John Vevera, have any personal knowledge tending to show the respective movements and situation of the said Sophia Rhodes and Eugene Rhodes, her son, at the time of the disaster aforesaid and immediately preceding their death; and it is further agreed that said Anna Bocker, if produced as a witness on behalf of the defendant John L. French, would testify, and the following is to be taken as her deposition to the effect, that just after the collision she saw the testatrix come out of her cabin, clothed in a blanket over her night-dress, as if to see what the matter was, and that she, the witness, never saw the said Mrs. Rhodes afterwards; that subsequently (certainly some minutes after) when she, Miss Bocker, went on deck she saw the said Eugene Rhodes just in front of her, and never saw him afterwards, and that the said John Vevera, if produced as a witness in behalf of said Waesner and Faul, would testify, and the following is to be taken as his deposition to that effect, that he is a resident of the city of Cleveland, county of Cuyahoga, Ohio, residing at 339 Burton street; that he has lived in said city for 26 years last past; that from 1893 to 1896 he was a member of the board of county commissioners of Cuyahoga county, Ohio; that since the first day of January, 1896, he has been and now is in the real-estate and insurance business in the city of Cleveland; that he was in Europe in the latter part of 1894 and took pas-

sage to return to this country on the steamship 'Elbe;' that on the night preceding the disaster to this ship he sat at the same table with a mother and son; that his attention was attracted to them, as they seemed so happy and as the mother seemed so much interested in the boy, and that shortly thereafter he learned that the name of the woman was Mrs. Sophia Rhodes, and that the young man was her son; that after the accident which occurred on January 30, 1895, when every one was on the deck, he saw these parties on the left side of the boat. The mother had her arms thrown around the neck of her son in a grip that he thought she would never lose, and the son was endeavoring to put a shawl around her to protect her from the cold.

"When affiant first came on the deck he went to the life-boat on the right-hand side of the vessel, but found it filled with ladies, and no man was allowed to enter the boat, but after it left the vessel a short distance it was swamped. Affiant then fought his way over to the left-hand side, further to the rear; had to fight his way through a crowd of sailors who were keeping every one back. As he got to the side of the vessel a man was standing there with an ax. A friend of affiant's who immediately preceded him was struck down, but affiant succeeded in overcoming the man with the ax and jumped over the side of the vessel, and that he was the last one to get into the life-boat, and was cut by the ax on his wrist.

"The time he saw Mrs. Rhodes and her son last was just prior to his jumping over the side of the vessel. Affiant further states that it would have been impossible for them to have gotten through the sailors, who were keeping everybody back; that he was the last one to get into the life-boat, and at the time he got in he was the nineteenth man in the boat. They endeavored to throw him out of the boat, but they did not succeed.

"Affiant further says that he is positive that Mrs. Rhodes and her son remained together on the deck, as the boat in which he succeeded in escaping was the last one to leave the ship; that the scene made an impression on his mind that he will never forget; that after the boat in which he had gotten was some distance away the ship went down with a lurch and every one on board was drowned; that both of these parties died together, and, so far as this affiant was able to learn, after he saw these parties on the deck clasped in an embrace that would never be loosed until after death, no one else saw them; that he has no interest in this case and his acquaintance with the parties was simply by reason of his attention being attracted to them and the fact that when he last saw them the mother and son were standing in the manner he has stated."

Upon the foregoing facts it was decreed that the Young Women's Christian Home was entitled to the fund, and it was ordered to be paid over accordingly. From that decree all of the other parties have appealed.

1. All that is certainly shown in the evidence agreed upon by the parties is, that the testatrix, Sophia Rhodes, and her son Eugene perished in the same disaster. There is no evidence upon which to base a judicial opinion that either survived the other; and in ad-

judicating the rights of those claiming under either of them the order of their deaths must be considered as judicially unascertainable.

Unlike the Roman law, and the modern laws of some countries and states derived or adopted therefrom, the common law indulges no presumption of survivorship, whatever may have been the age, sex, or physical condition of the respective persons proved to have lost their lives in a common disaster. It requires evidence as the basis of its action.

It would prove a useless consumption of time to review the older cases in England involving this question; for whatever doubt may have existed by reason of certain expressions used in some of them, has been finally set at rest by the decisions in two noted cases—one by the lord chancelior with the aid of two common-law judges, and the other by the House of Lords. Underwood *v.* Wing, 4 De G. M. & G. 633; Wing *v.* Angrave, 8 H. L. C. 183.

The American courts before which the question has come, have enounced the same doctrine substantially. Coye *v.* Leach, 8 Mete. 371; Newell *v.* Nicholls, 75 N. Y. 78; Cowman *v.* Rodgers, 73 Md. 403; Russell *v.* Hallett, 23 Kan. 276; Johnson *v.* Merriwether, 80 Me. 111; Estate of Ehle, 73 Wis. 445; Smith *v.* Armistead, 7 Fla. 81; Paden *v.* Briscoe, 81 Tex. 563.

2. Admitting the rule of the common law as stated and assuming that the order of death of mother and son in this case is unascertainable from the evidence, it has been contended that the property rights of those who claim under each decedent must be determined as if death occurred to each at the same instant. This view seems to have support in the language used in the opinions delivered in some of the American cases above cited, but we cannot accept it as logical and sound. It seems to us nothing less, in reality, than the substitution of one presumption for another—the, if anything, more unreasonable presumption of simultaneous death, for the rejected presumption of survivorship. Presumptions failing, the law requires evidence as a foundation for action upon either hypothesis. On application to the courts, there is always a burden of proof, slight though it may often be, upon him who has the affirmative, and if he fails to discharge it with evidence reasonably sufficient for the purpose, he must suffer the consequences of failure. His opponent succeeds, not upon proof of his own case or defense, but by reason of the absence of evidence on the necessary point.

In our opinion, therefore, the distribution of the personal estate of which Mrs. Sophia Rhodes was possessed at the time of her death must depend upon the ascertainment of the party whose position in the case is such that he must succeed because of the failure of evidence to establish the essential fact of survivorship.

3. The claim of the Young Women's Christian Home will first be considered.

If the will is to be construed as making the death of Eugene Rhodes, in the lifetime of his mother, a condition precedent to the taking effect of the bequest over, then it is quite clear that the burden of proving that fact is thrown upon the legatee and has not been discharged.

The question now occurs, and it is to it that the weight of the argument has been directed: Whether the will is to be so construed? The contention on behalf of the legatee is, substantially, that the obvious intention of the testatrix was to avoid intestacy absolutely, and that the home should take her estate not only upon the event expressly provided for, but also in case, as here shown, where her son, who was the first object of her bounty, could not possibly survive to take any practical benefit.

The argument in support of this contention prevailed with the learned justice who presided at the hearing and determined the decree rendered. It was conceded by him, as his opinion in the record shows, that, giving the words of the fourth item "their literal meaning, it must be held that the contingency therein named has not been shown to have happened." But he was of the opinion that the general intention of the testatrix that the home should have the benefit of her estate, if her husband and son were not able to take beneficially, was so apparent, the will must be construed as if either of the following clauses had been inserted therein by the testatrix: "Or in the event that my husband and son die at the same time with me," "or in the event that my husband and son do not survive me."

We are constrained to differ from this conclusion. It is undoubtedly true, that "the intent of the testator is the cardinal rule in the construction of wills;" but this intention must be found in the language of the will itself. Where such general intention is found, considerable latitude has been permitted in the way of rejecting the literal meaning of some words when irreconcilable with the context, and even in supplying words to give effect to this general intention, where it is plain that the testator has incompletely expressed his apparent meaning, and it is also plain what those words are which he must have meant to use, and yet, through negligence or ignorance, omitted. In such cases the construction is founded on the apparent condition of a contingency, or state of circumstances, present in the mind of the testator at the time, and which he has imperfectly described or provided for. But when the testator has evidently overlooked, or failed to apprehend, a particular contingency which might occur and change the course which his estate would otherwise take, the courts are not at liberty to read into the will a clause providing for that contingency, although they might believe generally that the testator would have inserted it had attention been called to it when the will was written and executed.

This very question was involved in the case of Wing *v.* Underwood, 4 De G. M. & G., 633, 654, and after careful consideration the decision was against the construction contended for. The condition upon which the bequest to Wing depended was: "And in case my wife shall die in my lifetime, then," etc. Husband and wife perished in the same shipwreck and there was no proof of survivorship. Lord Chancellor Cranworth, in disposing of the question, said:

"The gift to Mr. Wing is in terms made dependent and was evidently meant to be dependent, on the single event, sitting aside the children, of the testator surviving his wife: If she should survive,

he gives everything to her, if she dies in his lifetime he gives everything to Mr. Wing; it is impossible to say that there is any third case, or class of cases, to which the language of the will could possibly be applicable. It may be that, if the extremely improbable event which did occur had presented itself to the testator's mind as a possible contingency, he would have wished Mr. Wing to take his property; but then he would have done this, not by relying on the words now found in the will as being sufficient for the purpose, but by making express provision to accomplish his object.

"It is not sufficient to say that, if for any reason the gift to the wife fails to have practical operation, the testator must have intended to benefit Mr. Wing; the answer is, he has not said so, neither expressly nor impliedly; and if I were to attempt to supply the omission I feel that I should be making, not construing the testator's will."

The same question was later considered in the House of Lords in the case arising under the will of Mrs. Underwood, which gave her property to Wing also, in case her husband should die in her lifetime, and the same decision followed. Wing v. Angrave, 8 H. L. C., 183, 207, 215, 223. In giving his opinion Lord Wensleydale said:

"No one can doubt as to the testatrix's 'intention,' in the loose sense of that word. No one can suppose that she really meant not to give the property to Wing, if her husband and herself should happen to die at the same moment. No one doubts that, had she thought of such a possibility at the time she made her will, she would have provided for it by express words. But it cannot be too often repeated, that the true question in all these cases is, not what the testatrix intended to do, but what is the meaning of the words used in the will."

In the same case Lord Chelmsford used the following language which seems to us directly applicable to the conditions of the case at bar:

"In forming my judgment in this case, I have had to struggle with my strong inclination so to construe the will as to give the appellant the benefit under it, of which he has been deprived by a singular and unforeseen accident. I would gladly have found anything which either expressly or by necessary implication manifested any intention that he should take at all events upon the failure of the gift to Mr. Underwood.

"But it must be conceded, that the event which has happened was so extraordinary and improbable, that it was not likely to have occurred to the mind of any one, and therefore no provision for it could have been contemplated. We may, indeed, speculate with great probability, if not with certainty, as to what the form of bequest would have been, if the possibility of such event had been suggested; but to act upon such a speculation would be to make the will speak a different language for the purpose of satisfying an intention which could not have been conceived, and, therefore, could never have been meant to be expressed."

Another omission of this will tends to illustrate the impropriety of giving it — construction founded upon what has been aptly called,

"the testatrix's 'intention' in the loose sense of that word." No provision is made for the contingency of Eugene Rhode's death leaving issue. Consequently, upon the construction contended for, if he had married and left a child surviving him, that child would be cut out. This contingency, far more likely of apprehension than the one that did happen, was no more present in the mind of the testatrix than was the other. And there is nothing in the will or the circumstances surrounding the parties, that would justify any other conception than, that had it occurred to her she would have provided for it by apt words for the purpose.

The case of Newell *v.* Nicholls, 75 N. Y., 78, which is the authority most strongly relied on by the appellee, appears to us to be distinguishable.

The will vested the entire estate in trustees for the purpose of raising certain specified funds. The interest upon one fund was directed to be paid to a daughter during her life, with remainder to the heirs of her body if then living. In default of heirs of her body living at the time of her death, she had the power to appoint by will to whom she pleased. In default of said heirs living at the time of her death, or of the exercise of the power, the remainder was to the heirs of the body of the testatrix, then living, and in default of these, over to the heirs of Frederick Ridgway and others. A like fund was to be raised for the benefit of her son upon corresponding limitations. A third fund was to be raised for the benefit of her husband during his life, with remainder to the heirs of testatrix's body then living, and in default of such heirs living at the time of her death then over to Ridgway and others also. After the death of testatrix, her husband and mother, and the two children who were under the age of ten years, were lost in the wreck of the steamship Schiller, and there was no evidence from which survivorship could be ascertained. It was held, that the property had never vested in the children under the will, but the title had remained in the trustees until their death—the trust being valid and active, title was necessary to its execution; that the remainder over was a conditional limitation and not a condition precedent; and that the intent of the will was that it should be effectual if for any reason the children could not take. Following Wing *v.* Angrave, in respect of the doctrine of presumption, it was held that the appellants, who claimed under the two children, were charged with the burden of proving their title to some specific share or interest, and were not aided by their alternative claims. it was said by Chief Justice Church, who delivered the opinion of the court: "As to the daughter's share there was a failure to prove a title because it does not appear that the son survived the daughter, and the same is true of the share of the son."

The court also, incidentally, recognizes the distinction between the will of Mrs. Ridgway and that of Mrs. Underwood, by agreeing that the survivorship of the latter was a condition precedent to the taking of an interest by Wing.

In the next case relied on, the will is very different from the one under consideration. Robinson *v.* Portland Orphan Asylum, 123

U. S. 702. From the terms of the will in that case, it was plain that the widow of the testator was intended to take an interest for life and nothing more, and that the testator wished to avoid intestacy in any event. But no distinct words were read into the will to effectuate the aforesaid intention. The words, "at their death," which described the commencement of the gift over to the defendants, were reconciled with this plain intention, by taking them as indicating only the expectation of the testator, which he naturally indulged, that the beneficiaries named would not live to receive the gift intended, and not as requiring that the gift shall take effect at that time irrespective of the prior decease of the widow.

The final conclusion was stated as follows: "The limitations in the two subdivisions of the will are to be taken in connection with each other as a complete disposition in the mind of the testator of his estate, giving to the widow an estate for life, with an estate over for life to Ann Smith and Eleanora C. Robinson, contingent upon one or the other of them surviving the widow, with the ultimate remainder to the defendants."

4. Having disposed of the claim of the Young Woman's Christian Home, the next question for consideration is: Upon whom lies the burden of proof as between the next of kin of Sophia Rhodes and the administrator of Eugene Rhodes?

One contention is, that the *prima facie* right is in the next of kin of the mother, whose estate is to be distributed, and that the burden of proof rests upon the representative of the son to displace them by showing his survival. This proposition has support in a number of decisions, some of which seem to be directly in point, while others are more or less analagous. Coye *v.* Leach, 8 Mete. 371; Johnson *v.* Merriwether, 80 Me. 111; Russel *v.* Hallett, 23 Kan. 276; *In re* Evans' Settlement, L. R. 1 Eq. 288; *In re* Phene's Trust, L. R. 5 Ch. App. 139.

On the other hand, the contention is, that upon the death of the mother descent was immediately cast upon the son, and, therefore, the burden lies upon the next of kin of the mother to show the prior decease of the son; in other words, that it is incumbent upon them to show the extinction of the intervening, preferential right of the son's representatives.

The argument in support of this contention, is founded upon the supposed analogy to the rule that prevails, in this jurisdiction, in actions of ejectment, which is: That the burden is upon the plaintiff to show not only his descent from some common ancestor with the person last legally seised, but also the extinction of all lines of descent that could take in preference. Posey *v.* Hanson, 10 App. D. C. 496, 505, and cases cited. See, also, Skinner *v.* Fulton, 39 Ill. 485, 495; Emerson *v.* White, 29 N. H. 482, 492; Bates *v.* Schraeder 13 Johns. 260; Stinchfield *v.* Emerson, 52 Me. 465; Payne *v.* Payne, 29 Vt. 172; Anson *v.* Stein, 6 Iowa, 150, 152; Delaney *v.* Noble, 3 N. J. Eq. 441, 445. And the rule seems to be substantially the same where the action is to recover, or establish a claim to personal property. Schneider *v.* Piessner, 54 Ind. 524, 525; Gardner *v.* Kelso, 80 Ala. 497, 501; 2 Woerner Law Admn. p. 1234; Underwood *v.* Wing,

4 De G. M. & G. 633, 655, 659. In the last case it was said: "The next of kin stands as to personalty in the same position as the heir-at-law as to realty and the person claiming against him must make out his entire title.

"In the absence of any effectual disposition of the beneficial interest in personalty, the next of kin is entitled to it, and the person seeking to dispossess him of it is bound to prove a perfect title, and to rebut the *prima facie* case of the next of kin."

The foregoing, however, is to be taken in connection with the fact that the proof in that case showed the survival, for a brief space, of a child of Mr. Underwood; and that fact made a *prima facie* case for the representative of the child, which Wing was under the burden of overcoming by proving the existence of the condition upon which his title as legatee depended.

Nevertheless, the settled rule of law, as stated, governing the devolution of an estate as the legal consequence of the decease of its owner, would seem to furnish a strong foundation for the contention of the representative of the son in the case at bar.

At the same time it is evident that, whilst the cases last cited satisfactorily determine where the burden of proof lies and what is necessary to discharge its obligation, in cases where the plaintiff sues to recover the possession of property held by another under claim of title, and not as a mere trespasser or wrong-doer, none of them included in its decision the very question of this controversy: In whom vested the *prima facie* right upon proof of the death of the mother, regardless of the fact that the same evidence showed the death of the son in the same shipwreck? In other words, did the mother's next of kin take subject to displacement by proof of the son's survival? Or, did the son's next of kin succeed, subject to displacement by proof of the mother's survival?

Laboring under some divergency of opinion, we would have great difficulty in determining upon which of these parties the burden of proof lies, had Sophie Rhodes left no will. But as there is a will under which her estate has been so far administered, to which we may look for a solution of the difficulty, and we are agreed upon the relations of the parties created thereby, we prefer to base our conclusions upon its provisions.

5. The husband of testatrix, having died before her, it will be observed that item 2 of her will gives her entire estate absolutely to her son Eugene. Then follows item 3 containing the condition precedent to the bequest over for the benefit of the Young Women's Christian Home, and another for the husband's life, namely: "In the event of the death of my son Eugene Rhodes before the decease either of myself or of my husband, I then give," etc.

The condition is then repeated distinctly in the following form in item 4: "In the event of my becoming the survivor of both my husband Oliver Wheeler Rhodes, and of my son Eugene Rhodes, I then give, devise," etc.

The terms of the will, then, vesting the estate in Eugene Rhodes immediately upon testatrix's death, we agree that it raises a *prima facie* right in the personal representatives of the son, and imposes

the burden upon her next of kin of displacing them by proof of his mother's survival.

Proof of that fact having failed, it follows that the representatives and next of kin of the son are entitled to the entire fund. The decree appealed from is therefore reversed, with costs to be paid out of the fund in controversy, and the cause will be remanded with direction to enter a decree in conformity with this opinion.

Reversed.

WEDNESDAY, *March 6th, A. D.* 1901.

BARBARA FAUL, ANDREW WASNER, and JOHN L. French, Administrator of Eugene Rhodes, Deceased, Appellants,
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased; The Young Women's Christian Home.
} No. 1010, January Term, 1901.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court, in this cause, be, and the same is hereby, reversed; costs to be paid out of the fund in controversy; and that this cause be, and the same is hereby remanded to the said supreme court with direction to enter a decree in conformity with the opinion of this court.

Per MR. JUSTICE SHEPARD.

March 6, 1901.

Court of Appeals of the District of Columbia.

BARBARA FAUL ET AL.
vs.
GEORGE W. HULICK ET AL.
} No. 1010, January Term, 1901.

Now comes the appellee, The Young Women's Christian Home, and, showing to the court that the appellees George W. Hulick and John B. Larner, administrators, are without interest in the result of this cause, moves the court that it may be allowed an order of severance from its said co-appellees and an appeal on its own behalf from the decree of this court in the above cause.

J. J. DARLINGTON,
Sol. for Young Women's Christian Home.

We consent.
GEO. W. HULICK &
JOHN B. LARNER, *Adm'rs.*
By JOHN B. LARNER.

(Endorsed:) No. 1010. Court of Appeals of the District of Columbia. Motion of Young Women's Christian Home for leave to sever

from coappellees and prosecute appeal in its own behalf. Court of Appeals, District of Columbia. Filed Mar. 14, 1901. Robert Willett, clerk.

THURSDAY, *March 14th, A. D.* 1901.

BARBARA FAUL, ANDREW WASNER, and JOHN L. FRENCH, Administrator of Eugene Rhodes, Deceased, Appellants,
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased; The Young Women's Christian Home. } No. 1010.

On motion of Mr. J. J. Darlington of counsel for the appellee, The Young Women's Christian Home, it is now ordered by the court, that said appellee, be, and it is hereby, allowed an appeal to the Supreme Court of the United States, on giving bond to act as supersedeas in the sum of five thousand dollars. And it is further ordered by the court, that the said appellee, be, and it is hereby, allowed to sever from its co-appellees in this court, George W. Hulick and John B. Larner, administrators, *c. t. a.* of the estate of Sophia Rhodes, deceased, and prosecute said appeal in its own behalf.

BARBARA FAUL, ANDREW WASNER, and JOHN L. FRENCH, Administrator of Eugene Rhodes, Deceased, Appellants,
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased; The Young Women's Christian Home. } No. 1010.

On motion of Mr. J. J. Darlington, in behalf of Mr. A. A. Hoehling, Jr., of counsel for the appellants Barbara Faul and Andrew Wasner, it is now here ordered by the court that said appellants, be, and they are hereby, allowed an appeal to the Supreme Court of the United States, on giving bond to act as supersedeas in the sum of five thousand dollars.

Know all men by these presents, that we, The Young Women's Christian Home, as principal, and The United States Fidelity and Guaranty Company, a corporation of Maryland, as surety, are held and firmly bound unto John L. French, administrator of Eugene Rhodes, deceased in the full and just sum of five thousand dollars to be paid to the said John L. French, administrator of Eugene Rhodes, deceased, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of March, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between Barbara Faul, Andrew

Wasner, and John L. French administrator of Eugene Rhodes, deceased, appellants and George W. Hulick and John B. Larner, administrators *c. t. a.* of the estate of Sophia Rhodes, deceased: The Young Women's Christian Home, appellees a decree was rendered against the said The Young Women's Christian Home and the said The Young Women's Christian Home having obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said John L. French, administrator of Eugene Rhodes, deceased citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Young Women's Christian Home shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of Young Women's Christian Home.]

YOUNG WOMEN'S CHRISTIAN HOME. [SEAL.]
By HELEN W. PAIRO, *Vice-Pres't.* [SEAL.]
CAROLINE HERRON, *Treas.* [SEAL.]

[Seal of U. S. Fidelity & Guaranty Company.]

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By J. S. SWORMSTEDT, *Attorney-in-Fact.* [SEAL.]

Sealed and delivered in the presence of—
JOHN B. LARNER.

Approved by—
R. H. ALVEY, *Ch. Justice.*

[Cancelled 25c. internal-revenue stamp.]

[Endorsed:] No. 1010. Barbara Faul *et al.*, appellants, *vs.* George W. Hulick *et al.* Supersedeas bond of Young Women's Christian Home on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Mar. 19, 1901. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To John L. French, administrator of Eugene Rhodes, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Young Women's Christian Home is appellant and you are appellee, to show cause, if any there be, why the decree ren

dered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 19th day of March, in the year of our Lord one thousand nine hundred and one.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 19th day of March, 1901.

WM. HENRY DENNIS,
Solicitor for John L. French, Administrator.

(Endorsed:) Court of Appeals, District of Columbia. Filed Mar. 20, 1901. Robert Willett, clerk.

Know all men by these presents, that we, Barbara Faul and Andrew Waesner, as principals, and John S. Parrott and James B. Swing, as sureties, are held and firmly bound unto John L. French, administrator of Eugene Rhodes, deceased, in the full and just sum of five thousand dollars to be paid to the said John L. French, administrator of Eugene Rhodes, deceased, certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of March, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between the said Barbara Faul, Andrew Waesner, and John L. French, administrator of Eugene Rhodes, deceased, as appellants and George W. Hulick and John B. Larner, administrators *c. t. a.* of the estate of Sophia Rhodes, deceased, and The Young Women's Christian Home, as appellees, a decree was rendered against the said Barbara Faul, Andrew Waesner, George W. Hulick and John B. Larner, administrators *c. t. a.* of the estate of Sophia Rhodes, deceased, and The Young Women's Christian Home, and the said Barbara Faul and Andrew Waesner, having obtained an appeal, with supersedeas, and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said John L. French, administrator of Eugene Rhodes, deceased, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, that if the said Barbara Faul and Andrew Waesner shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their

plea good, then the above obligation to be void; else to remain in full force and virtue.

BARBARA FAUL. [SEAL.]
ANDREW WAESNER. [SEAL.]
By J. B. SWING, *His Att'y.* [SEAL.]
JOHN S. PARROTT. [SEAL.]
JAMES B. SWING. [SEAL.]

Sealed and delivered in the presence of—

MINA FAUL AND
BESS WASNER.

MINA FAUL AND
BESS WASNER.
WADE CUSHING,
F. E. LANGDON.
As to J. B. S.

Approved by—
R. H. ALVEY,
Chief Justice.

(Endorsed:) 1010. Barbara Faul *et al.*, appellants, *vs.* George W. Hulick *et al.* Supersedeas bond Faul and Wasner, on appeal to Supreme Court United States. Court of Appeals, District of Columbia. Filed Mar. 25, 1901. Robert Willett, clerk.

WASHINGTON, D. C., *March 22d*, 1901.

I hereby consent to the approval by the Court of Appeals of the District of Columbia of the within supersedeas bond on appeal to the Supreme Court of the United States.

J. W. SMITH,
Attorney for John L. French, Administrator of Eugene Rhodes, Deceased, Appellee.

UNITED STATES OF AMERICA, *ss:*

To John L. French, administrator of Eugene Rhodes, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Barbara Faul and Andrew Wasner are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this twenty-fifth day

of March, in the year of our Lord one thousand nine hundred and one.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted March 25, 1901.

WM. HENRY DENNIS,
Solicitor for John L. French, Administrator, Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Mar. 26, 1901. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 46 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Barbara Faul, Andrew Wasner and John L. French, administrator of Eugene Rhodes, deceased appellants *vs.* George W. Hulick, and John B. Larner, administrators *c. t. a.* of the estate of Sophia Rhodes, deceased, The Young Women's Christian Home, No. 1010, January term, 1901, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 27th day of March, A. D. 1900.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,098. District of Columbia Court of Appeals. Term No. 285. The Young Women's Christian Home, appellant, *vs.* John L. French, administrator of Eugene Rhodes, deceased. File No. 18,099. Term No. 286. Barbara Faul and Andrew Wasner, appellants *vs.* John L. French, administrator of Eugene Rhodes, deceased. Filed April 3, 1901.